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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ASUS COMPUTER INTERNATIONAL; and
ASUSTEK COMPUTER INCORPORATED,

Plaintiffs,

vs.

INTERDIGITAL, INC.; INTERDIGITAL
COMMUNICATIONS, INC.; INTERDIGITAL
TECHNOLOGY CORPORATION; IPR
LICENSING, INC. and INTERDIGITAL
PATENT HOLDING, INC.,

Defendants.

Case No. 15-cv-01716-BLF

**ASUS'S REPLY IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT**

Hearing Date: October 11, 2018
Time: 9:00 a.m.
Location: Courtroom 3, 5th Floor
Judge: Hon. Beth Labson Freeman

**REDACTED VERSION OF DOCUMENT
SOUGHT TO BE SEALED**

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Table of Abbreviations

IDC	Defendants InterDigital, Inc., InterDigital Communications, Inc., InterDigital Technology Corporation, IPR Licensing, Inc., and InterDigital Patent Holdings, Inc.
ASUS	Plaintiffs ASUS Computer International and Asustek Computer Incorporated
IPR	Intellectual Property Right(s)
ETSI	European Telecommunications Standards Institute, a standards development organization
3G	Third Generation (of cellular technology)
4G	Fourth Generation (of cellular technology)
FRAND	Fair, Reasonable and Non-Discriminatory
FAC	First Amended Complaint
MFL	Most-Favored Licensee
SEP	Standards-Essential Patent
SSO	Standard-Setting Organization
FA	Final Award in IDC-ASUS arbitration, Dkt. No. 135-4
Mot.	ASUS's Motion for Summary Judgment, Dkt. No. 231
Resp.	Defendants' Opposition to ASUS's Motion for Summary Judgment, Dkt. No. 259
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Huber Decl.	Declaration of Dr. Bertram Huber in Support of Defendants' Opposition to ASUS's Motion For Summary Judgment, Dkt No. 259-34
Merritt Decl.	Declaration of Dr. Bertram Huber in Support of Defendants' Opposition to ASUS's Motion For Summary Judgment, Dkt No. 259-82
RM Ex.	Exhibits to the Declaration of Ranae McElvaine, filed with Resp. (Dkt Nos. 259-64 to 259-81)
WM Ex.	Exhibits to the Declaration of William Merritt, filed with Resp. (Dkt Nos. 259-83 to 259-86)

Exhibits cited as "Ex. " are exhibits to the Declaration of Michael R. Franzinger, filed herewith.

Exhibits cited as "Mot. Ex." are exhibits to the Declaration of Michael R. Franzinger filed with ASUS's Motion for Summary Judgment, Dkt. Nos. 231-2 to 231-58.

I. INTRODUCTION

Applying the law to the undisputed facts of this case demonstrates that IDC's [REDACTED] breach the "non-discriminatory" prong of IDC's FRAND commitment to ETSI, of which ASUS is a third-party beneficiary. IDC does not dispute that it must make similar terms and conditions available to those "similarly situated." Application of *TCL*'s three-factor test to undisputed facts demonstrates that ASUS is "similarly situated" to competitors such as Samsung (and others). IDC does not dispute that it has not provided terms to ASUS that are similar to Samsung's (and other competitors). IDC does not dispute that it refuses to provide ASUS with licensing terms similar to Samsung's. Accordingly, the Court should summarily rule IDC has breached its non-discrimination obligation toward ASUS for 4G products.

What is more, IDC does not in any material way justify the [REDACTED]. Instead, IDC resorts to the others-do-it-too defense. But IDC does not get a free pass just because others may break the rules; anyway, IDC makes no effort to relate other [REDACTED]. More importantly, no Court has sanctioned [REDACTED] for ETSI FRAND-encumbered patents. To the contrary, *TCL* holds under the ETSI policy that "[s]ales volume alone does not justify giving lower rates to otherwise similar firms." *TCL Commc'n Tech. Holdings, Ltd. v. Telefonaktiebolaget LM Ericsson*, No. CV 15-2370 JVS(DFMX), 2017 WL 6611635, at *33 (C.D. Cal. Dec. 21, 2017) (emphasis added). But that is precisely how [REDACTED]. Thus, IDC's [REDACTED], in and of itself, a breach of its non-discrimination obligation.

IDC's opposition does not raise any disputed fact that is material. And it cannot defeat summary judgment by having witnesses contradict the law, advocating a hollowed-out version of FRAND. The undisputed facts are sufficient to establish that IDC does not comply with FRAND.

II. ARGUMENT

Under the proper legal framework and undisputed material facts, ASUS is similarly situated to Apple, Samsung, Huawei, LG, and others. And, the undisputed material facts establish that IDC discriminates against ASUS vis-à-vis these similarly situated companies through (at least) [REDACTED]

1 [REDACTED]. IDC litters its brief with irrelevant, conjured “issues of fact” and inaccurate legal
2 arguments that cannot derail this straightforward, logical outcome.

3 **A. Undisputable Material Facts Establish ASUS Is Similarly Situated to Other**
4 **Global Competitors under the Proper Legal Framework**

5 IDC refuses to treat ASUS as similarly situated to Samsung, Apple, and its other larger
6 licensees. Throughout negotiations, it has pinned [REDACTED]. *E.g.* Mot. 6:16-23
7 (citing unrefuted admissions); Resp. 24:24-25:2. This approach was rejected in *TCL*. Instead, the
8 proper framework for “similarly situated” set forth in *TCL* classifies firms based on the market they
9 compete in by considering geographic scope, whether they need licenses for the same purpose, and if
10 they have a threshold presence in the market. In that analysis, ASUS is similarly situated to “all
11 well-established firms” on the global cellular market, including Samsung, Apple, and Huawei.

12 **1. Under *TCL*, Undisputed Facts Establish ASUS Is Similarly Situated to its**
13 **Competitors**

14 The parties do not dispute that the non-discrimination prong of ETSI’s FRAND commitment
15 requires providing similarly situated companies with similar terms and conditions..

16 Applying French law, *TCL* defined “similarly situated” for the ETSI FRAND commitment as
17 applied to mobile device manufacturers. “Similarly situated” includes “all firms reasonably well-
18 established in the world market.” *TCL*, 2017 WL 6611635, at *30.¹ To identify “reasonably well-
19 established firms,” “[c]ertain factors obviously matter, such as the geographic scope of the firm, the
20 licenses required by the firm, and a reasonable sales volume.” *Id.* at *31. “This implies a necessarily
21 wide spectrum, and correctly so for several reasons” based on ETSI and to ensure the “non-
22 discrimination prong [is not] read out of the FRAND commitment.” *Id.* IDC does not dispute any of
23 the material facts establishing that ASUS is a “well-established global firm” like Apple, Samsung,
24 LG, Huawei and several others.

25 **a. Factor 1: Geographic Scope**

26 Under *TCL*’s first factor (geography), ASUS is similarly situated to the aforementioned
27 firms. *TCL* describes the “geographic scope” factor as distinguishing firms selling worldwide from
28

¹ Experts’ disagreement with this legal definition (Resp. 21:23-25) does not create fact disputes.

1 “local kings” whose “sales largely occur in one country.” *TCL*, 2017 WL 6611635, at *31-32. IDC
 2 admits that ASUS sells its devices globally—“in dozens of countries worldwide.” Resp. 1:27-28;
 3 Mot. Ex. 3 (ASUS cellular device sales in 42 countries); *see* Putnam Decl. ¶¶ 5-8 (describing
 4 ASUS’s global reach). IDC instead argues that ASUS is distinguishable from “[REDACTED]
 5 [REDACTED]” Resp. 22:4-6. This ignores that
 6 this factor is binary under *TCL*: either a company is a “local king” selling in only one country *or* a
 7 niche market or it is a global firm selling across countries and continents. *TCL*, 2017 WL 6611635,
 8 at *3. All companies with global reach are similarly situated, regardless of the extent of global
 9 reach—and ASUS indisputably falls within that category. *Id.* at *32-33. Even if geographic *profile*
 10 were relevant—which it is not—IDC’s reliance on a conclusory, unsupported statement in its CEO’s
 11 affidavit cannot defeat summary judgment. *Id.* (citing Merritt Decl. ¶ 53 (“[REDACTED]
 12 [REDACTED]”). Conclusory affidavits are insufficient to ward off summary
 13 judgement. *Finjan Inc. v. Blue Coat Sys., LLC*, 283 F. Supp. 3d 839, 850 (N.D. Cal. 2017).

14 **b. Factor 2: License Required**

15 Under *TCL*’s second factor, ASUS is also similarly situated to Samsung, Apple, LG, and
 16 Huawei. *TCL* focuses on the standards sought to be licensed and the devices licensed. *TCL*, 2017
 17 WL 6611635, at *33 (considering whether licenses were for “a blended global rate for a multi-mode
 18 4G license [and licensees] all create phones of similar technical specifications”). Here, ASUS
 19 requires and is seeking from IDC a license for the same technology and covering the same type of
 20 devices as Apple’s, Samsung’s, Huawei’s, LG’s and others’. For example, IDC has [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]. Compare RM Ex. 15 [REDACTED]
 24 with Ex. 1 ¶¶ 205, 209, 212-217 (summarizing IDC license terms). Indeed, ASUS has repeatedly
 25 sought “[REDACTED]
 26 [REDACTED]
 27 [REDACTED]” Mot. Ex. 26 at 1-2 (emphasis added).

28 In stretching this factor outside the bounds set by *TCL*, IDC ignores that “similarly situated”

cannot be defined “by picking and choosing criteria with no relation to its SEPs or the FRAND commitment.” 2017 WL 6611635, at *30. IDC distinguishes Samsung’s and Apple’s licenses based on those companies’ product mixes (*i.e.*, differing features and pricing). Resp. 21:23-25 (citing Putnam Decl. ¶ 9). But *TCL* rejected this same argument, ruling that Apple’s and Samsung’s the brand recognition, proprietary operating systems, high-end market customer base, and other intangibles do not warrant treating them differently than other well-established market players. 2017 WL 6611635, *33. IDC also argues that [REDACTED] in its Samsung license precludes ASUS from being considered similarly situated. Resp. 21:25-22:1. *TCL* did not consider this a distinction relevant to the “similarly situated” analysis; *TCL* considered licensees with both lump sum and running royalty structures. *See TCL*, 2017 WL 6611635, at *4, *42-43 (describing several licensees’ lump sum and Huawei’s running royalty); *id.* at *33 (not distinguishing Apple or Samsung on basis of lump sum license structure).

c. Factor 3: Niche v. Reasonably Well-Established Licensee

Under the final *TCL* factor, ASUS’s sale volume distinguishes it from niche and small firms and places it on the same footing as well-established global firms. *TCL* “views sales volume *only as a filter* to separate out niche and small firms from the reasonably well-established global firms. 2017 WL 6611635, *33 (emphasis added). IDC admits that ASUS is a “[m]ultibillion dollar cell phone manufacturer” rather than an SME. Resp. 20:6. IDC’s expert explains that “[s]ince 2008, Asustek has reported \$11.7 billion in worldwide mobile device sales.” Putnam Decl. ¶ 8; *see also* Ex. 1 ¶¶ 39-46, 50 ([REDACTED]). He also admits that [REDACTED] [REDACTED]—many of the same companies that *TCL* found were also similarly situated to Apple, Samsung, LG, and Huawei. *Compare* Putnam Decl. ¶ 11, *with TCL*, 2017 WL 6611635, at *31-33, *56. IDC does not dispute any of these facts, which are all *TCL* requires for the sales volume criterion. *Id.* at *33.

IDC uses [REDACTED] to stratify the global cellular market players into far narrower classes of “similarly situated.” *See* Mot. Ex. 17, p.12. IDC simply is arguing against the law set out in *TCL*. In fact, *TCL* explicitly admonishes against this granular fracturing of the market for reasons that apply

1 with equal force here. Market volumes are an unreliable metric in the volatile, dynamic cellular
 2 market and “excluding from the analysis the largest firms in the market would have the effect of
 3 insulating them, and further contributing to their dominant positions, by imposing a barrier in the
 4 form of a higher rate for those not at the top of the market.” *TCL*, 2017 WL 6611635, at *30-31. IDC
 5 has no response to these arguments, which were made in ASUS’s motion. *See* Mot. 20:27-
 6 21:23. IDC’s [REDACTED]: use “sales volume alone” to provide
 7 “lower rates to otherwise similar firms.” 2017 WL 6611635, at *33.

8 Thus, IDC raises no disputable material facts relevant to finding that ASUS is similarly
 9 situated to, *inter alia*, Apple, Samsung, LG, Huawei, and others under *TCL*’s legal framework.²

10 2. IDC’s Scattershot Attack on *TCL* as Inapposite Is Plainly Wrong.

11 Tacitly admitting that it discriminates under *TCL*’s framework, IDC launches a scattershot
 12 attack on the *TCL* decision and tries to recast the legal issues decided in *TCL* as factual ones. None
 13 of its arguments warrants denial of ASUS’s motion.

14 First, *TCL* is persuasive authority from a court in the same circuit, rather than inapposite law
 15 that should be disregarded as IDC claims. *See* Resp. 20:25-21:3 (Lacking any authority). *TCL*
 16 addresses the same contractual FRAND language in the same context (ETSI declarations) for the
 17 same cellular standards at issue here. *TCL* applies French law; it relies on the same ETSI source
 18 documents cited in the parties’ briefing here;³ and it had before it virtually the same expert testimony
 19 from the two ETSI experts in this case (Dr. Bekkers and Dr. Huber). *TCL*, 2017 WL 6611635, at *6-
 20 8, *30-33, *54-56. “[G]iven the similarity of circumstances presented,” this Court has considered
 21 such decisions from sister districts persuasive. *See Gianni Versace, S.p.A. v. Versace*, -- F. Supp. 3d
 22 --, 2018 WL 3548970, *3 (N.D. Cal. 2018) (relying on other district court decisions on whether the
 23 same trademark was similar as persuasive).

24 Neither does *TCL*’s issuance after a *bench* trial warrant disregard of *TCL* on summary

25 ² In arguing that [REDACTED] should not be considered similarly situated to ASUS because
 26 *TCL* disregarded the “top two” rates, IDC cites only the court’s evaluation of the appropriate royalty
 27 rate *after* it already determined who is similarly situated. Resp. at 20:16-19; *TCL*, 2017 WL
 28 6611635, at *33 (Samsung and Apple similarly situated), *50-51 (“Setting a FRAND Rate”).

³ This also refutes IDC’s arguments that the ETSI documents are inadmissible hearsay. ASUS cites
 the ETSI documents “not for the truth of [the] statements but for the fact they were made.” *1337523*
Ontario, Inc. v. Golden St. Bancorp, Inc., 163 F. Supp. 2d 1111, 1121 (N.D. Cal. 2001).

1 judgment, as IDC posits. Resp. 20:26-21:1, 11:17-19. IDC argues that the procedural posture of *TCL*
 2 indicates that “similarly situated” is a factual issue that must be tried. IDC ignores that the court
 3 analyzed “similarly situated” as a legal issue. The *TCL* court summarized its “similarly situated”
 4 analysis in its “conclusions of law” as one of the “legal principles which guide its factual analysis,”
 5 stating that “[f]or purposes of non-discrimination component of FRAND, one must look at similarly
 6 situated firms. Here, those firms are: Apple, Samsung, LG, HTC, and ZTE.” *TCL*, 2017 WL
 7 6611635, at *54-56.

8 IDC also urges the Court to ignore *TCL* because it is pending appeal. Resp. 21:3. And, on
 9 appeal, the SEP holder in that case does not dispute the definition or framework of “similarly
 10 situated” set forth by the district court—in fact, it argues the court applied the geographic factor too
 11 narrowly by failing to include certain smaller local firms as “similarly situated.” Ex. 3 at 64-66.

12 IDC next [REDACTED]. Resp. 22:19-25. [REDACTED] “Sales
 13 volume alone does not justify giving lower rates to otherwise similar firms.” 2017 WL 6611635,
 14 *33. *TCL* explicitly states that it is improper to treat well-established global competitors differently
 15 merely based their market share. *TCL*, 2017 WL 6611635, at *33. [REDACTED]
 16 [REDACTED] Mot. 16:6-18:5.

17 Nor does *Unwired Planet* help IDC. That court took an even broader view than *TCL* of who
 18 is “similarly situated”: it found that discrimination based on *any* licensee-specific characteristics
 19 (including size or volume) would violate FRAND. Mot. Ex. 30, ¶ 175. The court determined non-
 20 discrimination “has the result that all licensees who need the same kind of license will be charged
 21 the same kind of rate” regardless of whether they are “major players” or “new entrants”; “a
 22 benchmark FRAND rate should be derived which is applicable to all licensees seeking the same kind
 23 of licence.” *Id.* ¶¶ 175, 481, 503. IDC’s use of [REDACTED]
 24 better financial terms contravenes *Unwired Planet* just as it does *TCL*.

25 At bottom, IDC’s legal position is that [REDACTED]
 26 [REDACTED]. See, e.g., Mot. Ex. 9, 129:1-131:11 ([REDACTED])
 27 [REDACTED]; Ex. 2 at 15-17 (No. 22).⁴ As *TCL* admonished, “permitting
 28

[IDC] to define similarly situated very narrowly by picking and choosing criteria with no relation to its SEPs or the FRAND commitment would effectively allow [IDC] to read the non-discrimination prong out of the FRAND commitment.” *Id.*; Mot. 20:27-22:2.

3. The Court Should Reject IDC’s Argument That Factual Interpretation Issues Preclude Summary Judgement.

IDC purports to raise genuine disputes over the “interpretation” of the ETSI FRAND commitment and the meaning of “similarly situated.” Yet IDC does not offer its own interpretation of these terms or concepts, but only denies *TCL*’s interpretations, relying on the testimony of IDC-aligned witnesses. IDC’s avoidance of any affirmative position shows that these purported disputes are not genuine. Furthermore, IDC’s “interpretation” issues are really legal disputes, and the courts have not looked favorably on the positions IDC espouses. Finally, to the extent any of the interpretation issues could be characterized as factual, they fail to create any genuine dispute that could affect the outcome, because IDC does not even attempt to identify a way in which it met its nondiscrimination obligation, as explained above.

The crux of IDC’s argument on “interpretation of the ETSI licensing declaration” (Resp. 12:11-14:2) is that it has no obligation whatsoever to make FRAND offers. That is contrary to law. *TCL* finds that a licensor must make a FRAND offer. *See TCL*, 2017 WL 6611635, at *1 (“The Court must determine whether Ericsson met its FRAND obligation, and then whether Ericsson’s final offers before litigation, Offer A and Offer B, satisfy FRAND.”); *see also Apple, Inc. v. Motorola Mobility, Inc.*, 886 F. Supp. 2d 1061, 1087 (W.D. Wis. 2012) (“Apple must prove that Motorola’s initial offer of a 2.25% royalty rate and attempts to negotiate were unfair, unreasonable or discriminatory”). *Microsoft* holds that a RAND commitment to “negotiate licenses with other parties on a non-discriminatory basis on reasonable terms and conditions” can be breached by non-RAND offers. *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1031, 1045 (9th Cir. 2015).

Dr. Laithier’s opinions attempting to cabin the remedial powers of the Court are unreliable and/or irrelevant. It is settled law that U.S. courts can issue relief for breach of FRAND commitments. *See, e.g., TCL*, 2017 WL 6611635; *Apple*, 886 F. Supp. 2d 1061; *Microsoft*, 64 F. Supp. 2d 1023 (W.D. Wash. 2012); *Realtek Semiconductor Corp. v. LSI Corp.*, 946 F. Supp. 2d 998,

1 1005-1008 (N.D. Cal. 2013); *Research In Motion*, 644 F. Supp. 2d 788 (N.D. Tex. 2008); *In re*
 2 *Innovatio IP Ventures, LLC Patent Litig.*, 2013 WL 427167 (N.D. Ill. Feb. 4, 2013). Dr. Laithier's
 3 deposition revealed that he does not think a court could ever set a FRAND rate. Ex. 11 at 61:25-
 4 63:3, 64:17-65:3. His opinion cannot be reconciled with FRAND precedent, including cases
 5 applying French law such as *TCL* and *Apple*. Moreover, "[d]isputes among experts regarding foreign
 6 law do not create issues of fact." *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522, 540 (E.D.
 7 N.Y. 2011) (citation omitted). Nor can Dr. Laithier's contention that contract interpretation is a
 8 question of fact under French law alter proper Court procedure; contractual choice of substantive law
 9 does not override Federal Rule of Civil Procedure 56 or determine which issues must be tried to a
 10 jury. *See, e.g., Kenney v. Trinidad Corp.*, 349 F.2d 832, 837 (5th Cir. 1965) ("Under usually
 11 accepted choice of laws rules, procedural matters are governed by federal procedural law.").

12 IDC also argues that the interpretation of "similarly situated" is a factual dispute. Resp.
 13 10:23-11:11, 19:10-12. Yet courts routinely determine whether "similarly situated" is met (in various
 14 legal contexts) on summary judgment. *See, e.g., Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957,
 15 966-67 (9th Cir. 2017) (affirming summary judgment finding persons "similarly situated" under
 16 Equal Protection Clause); *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir. 2006) (granting summary
 17 judgment for failure to demonstrate "similarly situated" in a Title VII claim). IDC's assertion that
 18 "similarly situated" in the FRAND context is an issue of fact, rather than law, is also belied by case
 19 law and [REDACTED] during discovery. *See, e.g., TCL*, 2017 WL 6611635, at *56 (addressing
 20 "similarly situated" under "Conclusions of Law"); Ex. 4 at 119:15-24, 124:15-125:19, 129:23-130:7,
 21 225:5-20, 225:21-226:15, 228:24-229:9 ([REDACTED]
 22 [REDACTED]). IDC offers no interpretation of
 23 "similarly situated" of its own to rival that of ASUS or the *TCL* court. *See* Resp. 19:5-22:11. And, in
 24 any event, IDC's effort to raise "similarly situated" disputes is academic, because judging whether
 25 licensees are similarly situated is [REDACTED]
 26 [REDACTED].

27 Thus, IDC's purported interpretation disputes do not alter the proper legal framework, which
 28 establishes ASUS is similarly situated to well-established market participants who have or are

License (Model)						

See Mot. 6:1-6, 17:3-13 (providing citations); Mot. Ex. 14 at Ex. 23. A comparison of these tables demonstrate that

Mot. 16:6-16, 17:3-18:5. IDC ignores

. Even with

according to IDC's internal model, which is

indisputably higher than the corresponding terms

Mot. 16 n.3 & 17:3-13; Mot. Ex. 41, p.2. In fact,

Mot.16 n.3 & 17:3-13. (

See Ex. 1 at

Ex. 13.2; *see also* Mot. Ex. 41, p. 13 (

Regardless of whether a license is

. Mot. Ex. 15, 19:11-20, 21:9-24, 32:33-

33:8; *see* Ex. 6 at 1

), 3 (

⁷ IDC calculated this discount and ASUS contends the discounts was significantly less than 50%. But for purposes of summary judgement, ASUS uses the figure provided by IDC.

1 IDC takes issue with ASUS's use of IDC's internal licensing models because ASUS's tables
 2 sets out [REDACTED]
 3 these models. Resp. 16:12-15. The other terms are unnecessary to demonstrate [REDACTED]
 4 [REDACTED]
 5 [REDACTED] in its internal licensing models for [REDACTED]
 6 [REDACTED] Mot. 17:3-13; Resp. 16:8-13. As IDC concedes, it uses *these* internal models [REDACTED]
 7 [REDACTED]
 8 [REDACTED]. Mot. 5:14-16 (citing Mot. Ex. 15 at 89:6-13;
 9 Mot. Ex. 18 at 96:22-97:7). Yet, IDC attempts to deflect attention from these models by claiming
 10 [REDACTED] Resp. 16:13-14.

11 Leaving no stone unturned, IDC also asserts its models [REDACTED] Resp.
 12 16:14-15. IDC agreed to produce its most final models. Ex. 7 at 1; RM Ex. 18. Regardless, IDC's
 13 expert [REDACTED] as provided in the table, and his
 14 [REDACTED] IDC's models. *See* Mot. Ex. 14 at Report Ex. 23; Putnam Decl. Table 3.

15 **C. IDC Does Not Substantiate Its Discriminatory [REDACTED].**

16 Not only does IDC fail to dispute a material fact under *TCL's* analysis (other than to contend
 17 all licensees are dissimilar), which by itself justifies summary judgement; IDC also offers no
 18 economic justification for its [REDACTED]. It is uncontested that [REDACTED]
 19 [REDACTED]
 20 [REDACTED]. Indeed, although it makes a
 21 host of excuses for [REDACTED]
 22 [REDACTED]
 23 [REDACTED]. This motion seeks a ruling that IDC's [REDACTED]
 24 [REDACTED] are discriminatory. IDC's lack of economic
 25 justification for its particular [REDACTED] is not a "red herring" (Resp. at 24:21) but a
 26 second, alternative basis for summary judgement.

27 IDC is silent in response to ASUS's attack on its [REDACTED]
 28 [REDACTED] as discriminatory. Mot. 22:10-23:14; Resp. 25:3-13.

1 IDC does not dispute that the record is devoid of any evidence or explanation of [REDACTED]
 2 [REDACTED]. See Mot. 22:5-23:26. At most, IDC parrots Dr. Layne-Farrar's
 3 hypothetical justifications [REDACTED] *in general*. Resp. 25:8-15. But IDC does not respond
 4 to ASUS's point that these justifications are untethered to any quantitative analysis or to FRAND.
 5 See *id.*; Mot. 23:14-26. IDC musters no evidence purporting to show how its [REDACTED]
 6 [REDACTED] complies with its FRAND obligations. Thus, even if [REDACTED]
 7 [REDACTED] was not *per se* discriminatory, IDC presents no evidence to support a conclusion
 8 that [REDACTED] are consistent with its FRAND obligations.
 9 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (requiring "specific facts showing that
 10 there is a genuine issue for trial").

11 Lacking quantitative support, IDC falls back on allegations that others implement [REDACTED]
 12 [REDACTED] and that IDC received judicial approval of its [REDACTED]. As an initial matter, these
 13 arguments cannot refute that application of the undisputed facts to *TCL's* legal framework renders
 14 IDC's [REDACTED] discriminatory as to ASUS. See *supra* § A. What is more, IDC fails to
 15 identify any court that has approved IDC's (or any other) [REDACTED] under the ETSI FRAND
 16 commitment.

17 That other licensors may implement [REDACTED] is not a justification of [REDACTED]
 18 [REDACTED] at all, much less of IDC's. Many drivers run red lights, but that does not make it legal. IDC
 19 insists that [REDACTED] is an acceptable industry licensing practice that pre-dates and post-
 20 dates ETSI. Resp. 23:3-23:10. But where is IDC's specific evidence of such [REDACTED]
 21 IDC's only backing is a pair of conclusory, unsupported affidavits from its CEO, Bill Merritt, and its
 22 expert, Dr. Huber. A "conclusory, self-serving affidavit, lacking detailed facts and any supporting
 23 evidence, is insufficient to create a genuine issue of material fact." *Nilsson v. City of Messa*, 503
 24 F.3d 947, 952 n.2 (9th Cir. 2007) (citation omitted). Mr. Merritt [REDACTED]
 25 [REDACTED] Merritt Decl., ¶ 43. Dr. Huber's cited testimony consists of (1) a
 26 general reference to his "own experience for decades in the industry" and (2) an unsupported
 27 assertion that "[REDACTED] were already a constituent part of the industry at the time when the
 28 ETSI IPR Policy was adopted . . . and even more importantly, this industry practice has remained

consistent during the decades ever since, and it remains intact today.” Huber Decl. ¶ 81, 89; *see* Resp. 23:5-6. This type of naked affidavit cannot create factual disputes to defeat summary judgment. *Finjan*, 283 F. Supp. 3d at 850. Moreover, Dr. Huber admitted at deposition that [REDACTED]

Mot. Ex. 6 at 164:17-165:7. Putting aside the conclusory nature of IDC’s proffered support, IDC does not even attempt to demonstrate that “industry practice” relates in any way to [REDACTED]. And, of course, IDC would have to contravene *TCL*’s interpretation of the ETSI FRAND obligation to do so.

IDC argues patent pools give [REDACTED] too. But IDC’s references to pools are again no more than inapposite generalizations. And IDC identifies no instance—in court or a governmental agency—where a pool’s [REDACTED] were found to be FRAND-compliant. Further, IDC relies on pools that relate to other SSOs (ITU or IEEE). *See* Resp. at 24:5-10; *Microsoft*, 2013 WL 2111217, at *1, *88. IDC itself argues elsewhere a pool that has “no relationship to ETSI or standard-essential patents” is irrelevant to the dispute here. Resp. 19 n.8.

Finally, IDC claims that arbitrations and ITC investigations found IDC’s [REDACTED] consistent with ETSI’s FRAND obligation. But IDC cannot show a single discussion, let alone an authorization, of IDC’s [REDACTED] in any court, arbitration, or regulatory agency proceeding, because that does not exist. IDC and Mr. Merritt [REDACTED]

[REDACTED]. *See* Resp. 23:18-25; Ex. 4, 142:9-19. And [REDACTED]. *See* Resp. 23:12-15, WM Ex. 1 at 2; Dkt. No. 234 at 16:12-22. [REDACTED]

[REDACTED] Ex. 4, at 141:19-24. Likewise, IDC’s claim that [REDACTED]

[REDACTED]. *See* Ex. 9 at 71:23-73:1. IDC’s claim that [REDACTED]

[REDACTED] *See id.* 23:15-28; Ex. 4 at 141:25-142:7. IDC would doubtless have produced the [REDACTED] in

discovery if it [REDACTED]. See Fed. R. Civ. P. 56(c)(1)(B) (IDC “cannot produce admissible evidence to support the fact”). Mr. Merritt’s testimony about [REDACTED] is no substitute for the real thing. See Resp. 23:15-18 (citing Merritt Decl. ¶ 49). Further, IDC’s expert [REDACTED] See Putnam Decl. ¶ 38.

D. The Plethora of Other Issues IDC Raises Do Not Preclude Summary Judgment

The remainder of IDC’s response is devoted to other issues not relevant to ASUS’s motion. These issues have no effect on, and should not be allowed to obscure, the undisputed material facts and sound legal bases that warrant granting summary judgment.

For example, IDC attempts to add extra elements to the cause of action for breach. IDC contends that ASUS must prove patent essentiality, but cites no authority that requires such proof. Resp. 12, n.3 (citing case law on what it takes to prove essentiality, but not on whether a FRAND contract plaintiff must prove it). Contrary to IDC’s take on the law, a court can find a patent owner violated its FRAND obligation without adjudicating the infringement or essentiality of individual patents. See *Microsoft*, 795 F.3d at 1040-47 (affirming district court’s determination of a RAND rate and jury’s verdict of breach without any adjudication whether the declared patents were actually essential). Regardless, IDC has [REDACTED]. Mot. 3:22-4:1 (citing, e.g., Mot. Ex. 8, at 6-8; Mot. Ex. 9 at 99:6-23).

Likewise, IDC’s argument that ASUS must prove it “is not an unwilling licensee” as an element of the breach of contract claim is not supported by any applicable law or IDC’s own pleadings. See Dkt. No. 112, 16:11-13 (listing “unwilling licensee” status as a *defense* for IDC). IDC betrays its lack of support when it relies solely (and wrongly) on ASUS’s French law expert, Dr. Stoffel-Munck, for this proposition. Resp. 14. This is no support at all, because IDC is employing a different meaning of “unwilling licensee” than Dr. Stoffel-Munck. He specified in the next paragraph and the next two answers that he was referring to a potential licensee that has “refused to benefit” from the FRAND right. Ex. 10 at 132:9-134:1. That description cannot reasonably be applied to an entity that affirmatively asks the Court to set the terms of a FRAND license (and that continues to pay IDC (excessive) royalties for all licensed products). ASUS is such an entity;

1 through this action, it is legally bound to enter a license with IDC. *See* Dkt. No. 107 (FAC) at 33:16-
 2 19 (requesting that “IDC specifically perform its contractual obligation to grant [ASUS] a license on
 3 [FRAND] terms” and that the Court “set[] the proper FRAND terms and conditions for IDC’s
 4 cellular...portfolio.”); *id.* at 33:18-19; *see also Realtek*, 946 F. Supp. 2d at 1007 (implementer’s
 5 admission that it is willing to accept a RAND license defeated “unwilling licensee” arguments).

6 Further, IDC introduces a pejorative discussion of ASUS’s negotiations strewn with
 7 inaccuracies and omissions, Resp. at 6:10-9:19, but never relies on any of it as a basis for opposing
 8 summary judgment. IDC does not dispute the only material fact from the negotiations that *is relevant*
 9 [REDACTED] at issue in this motion: [REDACTED]
 10 [REDACTED]
 11 [REDACTED]. *See* Mot. 15:26-18:9. Even IDC’s [REDACTED] does not place
 12 ASUS on similar footing with its larger competitors. *Id.* at 16 n.3.

13 IDC also diverts several pages of its brief to a non-existent argument about [REDACTED].
 14 Resp. 15:16-17:3. Contrary to IDC’s assertion that “[REDACTED]
 15 [REDACTED],” ASUS’s Motion focuses on the [REDACTED].
 16 [REDACTED]. Mot. Ex. 15 at
 17 19:11-20; Ex. 6 at 1, 3. IDC’s other [REDACTED] only further
 18 discriminate against ASUS, but the Court need not adjudicate [REDACTED] to grant this Motion.

19 Finally, IDC emphasizes that ETSI envisioned that FRAND licenses would be negotiated at
 20 arm’s length between the licensee and patent holder. Resp. 5:3-5. ASUS does not dispute this point.
 21 But it is inapposite to ASUS’s Motion. ETSI’s discussion of arm’s-length negotiations does not
 22 negate the FRAND obligation or suggest that a license necessarily becomes FRAND just because it
 23 was entered into at arm’s length.

24
 25 DATED: September 27, 2018

26 By: /s/ Michael R. Franzinger

27 Michael R. Franzinger

28 Attorney for Plaintiffs

ASUS COMPUTER INTERNATIONAL, and
 ASUSTEK COMPUTER INCORPORATED